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Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

In the matter of COSMOPOLITAN POWER COMPANY, Bankrupt,

STATE OF NEW JERSEY,
Appellant,

vs.

WILLIAM F. ANDERSON, Trustee of COSMOPOLITAN POWER COMPANY, Bankrupt,
Appellee.

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SUGGESTIONS OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE FOR LEAVE TO ASSIGN CROSS-ERROR, OR FOR THE ALLOWANCE OF A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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SUGGESTIONS OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE FOR LEAVE TO ASSIGN CROSS-ERROR, OR FOR THE ALLOWANCE OF A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

This is a motion by the appellee for leave to assign cross-error with respect to a portion of the decree of the Court of Appeals, which is not involved in appellant's present appeal to this Court. On *May* 11, 1905, Mr. Justice Day allowed the present appeal upon a certificate that the determination of the particular

question involved was essential to a uniform construction of the Bankruptcy Act. On *November* 13, 1905, appellee moved to dismiss the appeal herein on the ground that the determination of the particular question was *not* essential to a uniform construction of the bankruptcy act. That motion was submitted on briefs and thereafter denied. Nearly nine months after unsuccessfully contending that the appeal was improperly allowed, appellee interposes his present motion to assign cross-error. It is necessary to a proper understanding of the questions involved in the present motion to refer but very briefly to the record.

The Cosmopolitan Power Company (the bankrupt) is a corporation organized under the laws of the State of New Jersey April 30, 1900. A petition in bankruptcy was filed against it on April 23, 1903, and it was thereafter adjudicated a bankrupt. The franchise taxes due the appellant, the State of New Jersey, by the bankrupt, for the years 1902 and 1903, were not paid. The 1902 taxes ($5,750) were assessed November 7, 1902, and the 1903 taxes ($2,500) were assessed June 1, 1903, after the filing (April 23, 1903), of the petition in bankruptcy. The latter assessment, however, was made for the year beginning *January* 1, 1903. The State of New Jersey filed its claim for the taxes for the years 1902 and 1903 and thereafter moved for an order on the trustee to pay the same as a *preferred* claim. The Referee and the District Court allowed the claim for the 1902 taxes as a *general* claim, but denied the claim for the 1903 taxes *in toto*, on the ground that the taxes were not owing at the date of the filing of the petition in bankruptcy. An appeal

was prosecuted by the State of New Jersey to the Court of Appeals for the Seventh Circuit. That court allowed the claim of $2,500 for the 1903 taxes as a *general* claim, but in other respects affirmed the judgment of the District Court, and denied priority to any part of the claim of appellant. (See 137 Fed. Rep. 858.)

Thereafter, on May 11, 1905, Mr. Justice Day allowed the appeal of appellant under the provisions of Section 25, Clause 2, of the Bankruptcy Act, which provides *inter alia* that an appeal may be had from any final decision of a Court of Appeals allowing or rejecting a claim,

> "Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

The appeal was prosecuted for the purpose of determining the question as to whether a franchise tax was entitled to priority by virtue of the provisions of Section 54, Subd. A of the Bankruptcy Act, upon which question there is a sharp conflict in the decisions.

The question as to whether the claim for the 1903 taxes was properly allowed as a general claim is in no way whatever involved in the present appeal, nor is a decision upon that question essential to a uniform construction of the Bankruptcy Act. The appellee is attempting to assign cross-error in respect to the action of the Court of Appeals in allowing the claim for the 1903 taxes. In the suggestions in support of their motion, counsel for appellee say:

> "Appellee could not appeal from the decree of the Circuit Court of Appeals, since the only question involved in such an appeal would be whether or not the Circuit Court of Appeals was right in allowing a general claim for the license fee of 1903. That did not involve a question which might have been taken on appeal or writ of error from the highest court of a state to this court; *nor did it involve a question whose determination is essential to a uniform construction of the Bankruptcy Act throughout the United States.* Under Sec. 25, of the Bankruptcy Act, these are the only cases in which an appeal may be had to this court. *Appellee was, therefore concluded* by the decree of the Circuit Court of Appeals."

This admission necessarily leads to a denial of the pending motion.

The decision of the Court of Appeals with respect to the allowance of the 1903 taxes was final, and as the determination of that question is not essential to a uniform construction of the bankruptcy act, no appeal could be taken under the provisions of Section 25, Clause 2 of the Bankruptcy Act.

It is the settled practice of this court that when an appellee has not prosecuted, or cannot prosecute an appeal to this court, he can only be heard in support of the decree, and cross-errors cannot be assigned.

In *Chittenden* v. *Brewster*, 2 Wall., 191, the appellee objected that certain material facts in the bill had not been proven and it was contended that the defect was fatal to the complainant. This court said:

> "This would be so, if the appellees, against whom the decree was rendered, had appealed from the same. * * * But here the complainants only have appealed, and the rule is settled in the

appellate court, that a party not appealing *cannot take advantage of an error in the decree committed against himself*, and also, that the party appealing cannot allege error in the decree against the party not appealing. If the appellees desired to avail themselves of this error in the decree, *they should have brought a cross appeal.* By omitting to do so, they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing."

In *The Slavers*, 2 Wall., 383, it was said:

"Parties who have not appealed are not entitled to be heard in this court, except in support of the decree in the court below. They cannot ask for a reversal in the appellate court. * * *"

In *The "Stephen Morgan,"* 94 U. S., 599, the court held:

"Parties who do not appeal from a final decree of a circuit court which is regular in form cannot be heard in opposition to the decree when the cause is removed here by the opposite party, unless it appears that the proceedings in removing the cause were unauthorized or irregular. They may be heard in support of the decree, and in opposition to every assignment of error filed by the appellants."

And again in *United States* v. *Blackfeather*, 155 U. S., 180, 186, this court said:

"As the claimant took no appeal from the judgment of the court below, of course we are not called upon to consider the numerous errors assigned in his brief to its action in refusing to make certain allowances claimed in his petition. *The Stephen Morgan*, 94 U. S., 599. We are concerned only with the appeal of the government from the allowances actually made, and shall limit

our decision to the errors assigned by the Attorney General in his brief."

To the same effect see:

Mail Co. v. *Flanders,* 12 Wall., 130, 135;
The Mabey, 13 Wall., 738;
Ewing v. *City,* 5 Wall., 413;
Alviso v. *United States,* 8 Wall., 337.

And it is equally well settled in this court that an appellee cannot assign cross-errors where an appeal has not or cannot be taken by such appellee.

In *The Maria Martin,* 12 Wall., 31, 40, the court said:

> "Both parties in a civil action may sue out a writ of error, to a final judgment, but where one party only exercises the right, *the other cannot assign error in the appellate court.* * * * Where each party appeals each may assign error, but where only one party appeals, *the other is bound by the decree in the court below, and he cannot assign error in the Appellate Court,* nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."

And in *Clark* v. *Killian,* 103 U. S., 766, this court expressly held that it would not consider errors assigned by the appellee.

In *Bolles* v. *Outing Co.,* 175 U. S., 262, 268, the court concludes:

> "It is sufficient to say of these that the defendant did not take out a writ of error and cannot now be heard to complain of any adverse rulings in the court below." (Citing cases.)

In the recent case of *Guarantee Co.* v. *Phenix Insurance Co.* (C. C. A. 8th Cir.), 124 Fed., 170, the court

reviews the authorities and arrives at a similar conclusion, saying (pp. 172, 173):

> "No decisions in the federal courts in which this rule has been disregarded or doubted have been called to our attention, and none have rewarded a diligent search. The rule has been in force for so many years that it is not now a matter of reason, but a question of practice. It is to be determined not only by an independent consideration and decision of what the rule ought to be, but by a view of the precedents in the national courts which disclose the practice that has been and is prevailing in those courts. The decisions and opinions to which reference has been made disclose the fact that this uniform practice has been and is in accordance with the following rules: * * *
>
> A defendant in error who does not sue out a writ of error, or an appellee who does not take an appeal, cannot confer jurisdiction upon an appellate court to consider or decide questions suggested by an assignment or an argument of cross-errors, nor can he be heard upon such questions."

To the same effect see:

Gage v. *Pumpelly*, 115 U. S., 454, 463;

Bldg. & Loan Assn. v. *Logan*, 66 Fed., 827 (C. C. A. 5th Cir.).

And in other jurisdictions the rule exists that assignments of error are only allowable when the party making the assignment could have supported a separate and distinct appeal.

2 Ency. Pl. & Pr., p. 971n.

Wright v. *Evans*, 53 Ala., 103.

Holdsomebeck v. *Fancher*, 20 So., 519; 112 Ala., 469.

And where an appeal is taken from a particular part of a judgment or decree, or where the Appellate Court acquires jurisdiction to determine a particular question, cross-errors cannot be assigned as to that part of the judgment or decree not brought up by such appeal.

Walker v. *Pritchard*, 121 Ill., 221;
Vol. 2 Cyclo. of Law & Proced., p. 1011.

In the present case, as we have pointed out, the appeal was taken with respect only to the question of the priority of the tax, and therefore no error can be assigned with respect to the other portions of the decree not appealed from.

Counsel refer to the case of *United States Rubber Co.* v. *American Oak Leather Co.*, 181 U. S., 434, as establishing a contrary doctrine. The question as to the right to assign cross-errors was not involved, raised or discussed in that case. A writ of *certiorari* was allowed upon the *petition* of certain of the defendants and the *cross-petition* of the complainants.

In that very case (see p. 444) "an *appeal* and a *cross-appeal* were taken to the Circuit Court of Appeals." Other than in the fact that the name of one of the learned counsel for appellee appeared on the brief of one of the parties in that case, we can find no relevancy in the citation.

It is also urged as an alternative motion that a writ of *certiorari* should issue to revise the judgment of the Court of Appeals allowing the claim of appellant for the 1903 taxes. The only question that exists with respect to those taxes is whether they are a provable claim. The Referee and the District Court dis-

allowed the claim for the 1903 taxes, on the ground that the liability was not fixed at the time of the filing of the petition in bankruptcy. The petition was filed April 23, 1903. Under the law the tax in question is assessed upon the capital stock of the corporation, issued and outstanding January 1st preceding (Laws of N. J. 1901, p. 31.) It is there provided that

> "All corporations * * * shall make annual return to the State Board of Assessors on or before the first Tuesday of May in each year, and shall state therein the amount of the capital stock of such corporation *issued and outstanding on the first day of January preceding the making of said return.*" * * *

In 1903 the corporation made a return (Rec., 45), stating the amount of its capital stock issued and outstanding on January 1st of that year. It is upon this return that the assessment was made. Even though this assessment was not made until after the filing of the petition in bankruptcy, it is a provable claim because the making of the assessment was a mere ministerial duty on the part of the board to figure out the amount of the statutory tax due, viz.: one-tenth of one per cent.

Section 63 A of the Bankruptcy Act provides that certain debts may be proved against the bankrupt estate. Under this section it is immaterial when a debt is *payable*. It is sufficient if the liability be *fixed* at the time the petition is filed. The amount of the tax was fixed by the statute and the proceedings of the assessors thereafter could not change the basis of the tax. *Certum est quod certum reddi potest.*

It will be noticed that "taxes" are not specified in

the list of provable debts referred to in section 63. Taxes are covered by section 64. That section states that the court *shall order the trustee* to pay all taxes legally due and owing by the bankrupt.

Section 63 contains an express limitation that the debts shall be owing "at the time of the filing of the petition." Section 64 contains no such limitation. It is well settled that a discharge in bankruptcy does not discharge a liability to the state for taxes: In Collier on Bankruptcy (5th Ed.), p. 208, under the head of "What Debts Are Not Dischargeable," it is said:

> "*Liabilities to the State.*—This follows from the doctrine that the liabilities to the sovereign will not be affected, unless he by express words extends the provisions of a statute to himself. Indeed, it is thought that taxes would be excepted from the general dischargeability of provable debts, even were the statute silent. There is hardly enough in Section 64A, giving them priority of payment, to warrant the claim that the sovereign intended to waive his exemption here. *Besides, the words used in Section 63A seem to take taxes out of the class known as 'provable debts,' and thus they could not be discharged in any event.*"

In the *U. S. Car Co. case*, 60 N. J. Eq., 514, the exact contention was passed upon. The court said:

> "But it is contended on behalf of the receivers that even if it be considered that this 'tax' was properly laid, still, by force of the statute under which it was assessed, it became 'a debt due to the state *when determined*,' and that, as it was not 'determined' until some months after the receivers were appointed, it was, distinctly, not a debt of the corporation at the time of their appointment, and consequently is not payable out of the assets in their hands, for the reason that, by their appointment, such assets were converted into a trust fund for *then existing creditors.*" * * *

> It is manifest, therefore, that when the 'tax' is assessed against an insolvent corporation, after the appointment of a receiver, the fund out of which its payment must be preferred is that which is in his hands, for there is no other fund upon which it can be charged, and consequently in no other way can each of these two statutory provisions be given full force and effect."

And on page 516 the court said that the tax was due—

> "Without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test, in determining its liability to comply with those conditions, so long as they remain unrevoked, *is the existence or non-existence of the corporation.*"

It thus appears that the taxes are expressly made a preferred claim against the trustee, even though they are not assessed until after the petition in bankruptcy is filed. A discharge in bankruptcy would not bar the claim of the state against the corporation, as under the decision in the Car Co. case, the corporation is liable until its charter is surrendered to the state.

The Court of Appeals in its opinion said:

> "As to the $2,500 item, the question is whether it was a debt owing on April 23, 1903, when the petition was filed. The promise of the bankrupt, as we construe it, was to pay on or before the 1st of July in each year a sum based on the amount of stock issued and outstanding on the 1st day of January of that year. On January 1, 1902, the amount of stock issued and outstanding was $10,000,000. That determined the amount, even though the stock was reduced to $2,500,000 on May 13, 1902, long before the obligation matured and could be sued upon. Prior to January 1, 1903,

> the promise to pay on or before July 1, 1903, did not evidence an accrued debt, because it could not be known whether any stock would be outstanding-ing when the 1st of January should come around. But on that date we think the promise accrued to pay one-tenth of one per centum on $2,500,000 of stock then outstanding. That the claim bore no interest and could not be sued upon before the 1st of July affects only the maturity of the obligation."
>
> (See 137 Fed., 858, 863.)

As already shown, counsel for appellee admit in the suggestions filed in support of the present motion, that a decision upon the question of the allowance of the 1903 taxes is not essential to a uniform construction of the Bankruptcy Act. It is needless to cite authority in this Court that the power to issue the writ of *certiorari* is most sparingly exercised, and then only in cases of great gravity and importance.

Whether a particular claim is or is not due at the time of the filing of a petition in bankruptcy is not a question of such gravity or importance as to justify resort to such an extraordinary remedy.

The present application for a writ of *certiorari* should be treated the same as though no appeal had been allowed to appellant. If no appeal were now pending we apprehend that appellee would not be bold enough to ask for a writ of *certiorari* to review the decree of the Circuit Court of Appeals allowing as a general claim the $2,500 taxes due the State of New Jersey for 1903.

Respectfully submitted.

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